Supreme Court, U.S.
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No. 09-982

In The

Supreme Court of the United States

BRIAN MOORE,

Petitioner,

v.

DELBERT HOSEMANN,
Mississippi Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*.

2. Whether state certification in the absence of unusual circumstances should be preferred to abstention under *Railroad Commission v. Pullman Company*.

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REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over Whether Rule 4(e) Applies to State Officials Sued in their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Respondent concedes the circuit-split over Rule 4(e)'s application to prospective actions filed against state officials in their official capacities under 42 U.S.C. § 1983. *See* Brief in Opposition at 15. He hopes to divert the Court's attention from this split, however, by arguing that Rule 4(d)'s application presents no clear split in the circuits. *See* Brief in Opposition at 10.

The question presented in this case is "[w]hether Federal Rule of Civil Procedure 4(e)'s provision for service of process on individuals applies to official-capacity actions filed against state officers under the logic of *Ex parte Young*." *See* Petition for A Writ of Certiorari at i. Because a circuit-split exists over the question presented, certiorari is proper. To be sure, Rule 4(d)'s application in this case depends in part on the answer to this question. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113 (D. Me. 2006). But so do many procedural matters. *See, e.g., Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003); *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24 (1st Cir. 1988); *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720). That additional circuit-splits involving derivative questions have yet to arise does not counsel against resolving the circuit-split at hand.

Respondent also argues that certiorari is not warranted because Petitioner did not comply with Rule 4(d). *See* Brief in Opposition at 17-20.[1] He attempts to use factual disputes to cloud the clear legal question presented. Neither court below, however, saw fit to address the disputed facts raised by Respondent, let alone resolve them. Petitioner was denied costs and attorney's fees because Rule 4(e), the Fifth Circuit ruled, does not apply to state officials sued in their official capacities. Assuming this legal question is resolved in Petitioner's favor by this Court, Respondent will, of course, have the opportunity to raise his factual defenses on remand.[2] These factual challenges do not now stand in the way of the legal question presented.

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[1] Respondent's attempt at belatedly impeaching Petitioner's service of process is also of no avail. *See* Brief in Opposition at 20. Putting aside the disputed factual nature of this claim, as well as Respondent's waiver of any challenge to service of process (by not raising it in the district court, *see* Rule 12(h)(1)), Respondent concedes that Petitioner properly served Respondent through Mississippi's Attorney General pursuant to Mississippi law. *See* Brief in Opposition at 20. This mode of service is authorized by Rule 4(e)(1), which borrows local service provisions. Respondent was therefore, by his own admission, properly served under Rule 4(e).

[2] Respondent does not argue, nor could he, that Mississippi's change to its filing deadline moots Petitioner's claim to costs and attorney's fees under Rule 4(d). He therefore apparently agrees with Petitioner that mootness is not a problem in regard to Petitioner's first Question Presented. *See* Petitioner's Supplemental Brief at 1.

II. Preferring Abstention Over Certification Contradicts This Court's Instructions and Practices in Other Circuits.

Respondent concedes that the Fifth Circuit's preference for abstention (under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)) over certification contradicts this Court's holding in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), as well as the practices of every other circuit court. *See* Brief in Opposition at 21. At least, he does not claim to the contrary. He argues instead that the question was rendered moot by Mississippi's change in its filing deadline,[3] *see* Brief in Opposition at 21, and is otherwise barred by the Eleventh Amendment. *Id.* at 25.

The Eleventh Amendment poses no obstacle here. Petitioner filed suit against Respondent in his official capacity for prospective relief under 42 U.S.C. § 1983 using the logic of *Ex parte Young*, 209 U.S. 123 (1908), and the holding in *Will v. Michigan Department of*

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[3] Contrary to Respondent's assertion, *see* Brief in Opposition at 8, Petitioner has not claimed that Mississippi's legislative change was "dastardly," nor precipitated by this Court's call for a response. Petitioner stated in his Supplemental Brief that this timing was coincidental. Still, it remains obvious that the change was motivated by the Fifth Circuit's ruling that the matter was not moot and could proceed in the district court (subject to *Pullman* abstention). Respondent concedes this fact, *see* Brief in Opposition at 8-9, and therefore admits that the legislature's change was motivated by its desire to resolve the case.

State Police, 491 U.S. 58 (1989). The Eleventh Amendment, under the circumstances described in these cases, does not stand in the way of prospective relief awarded under 42 U.S.C. § 1983 and the federal Constitution. Petitioner clearly claims that Respondent's fixing a new deadline for presidential elections violates Article II of the United States Constitution. He seeks declaratory and injunctive relief. He does not claim damages. His claim fits neatly within the *Ex parte Young* exception to the Eleventh Amendment.

Respondent broadly argues that "the Eleventh Amendment prohibits all relief against state officials based solely on past acts and prohibits all prospective relief unless there exists an on-going violation of federal law." Brief in Opposition at 25. This charge cannot withstand this Court's voluntary cessation jurisprudence – which is premised on government's subsequently coming into compliance with federal law, *see, e.g., City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) ("now, as then, the mootness question is controlled by . . . the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice'") – and contradicts this Court's "capable of repetition"

doctrine – which assumes the absence of an on-going violation. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000) (describing how mootness is different from standing).

Cases like *Aladdin's Castle* and *Northeastern Florida Chapter of Associated General Contractors* prove that federal judicial authority to award prospective relief under the Constitution and 42 U.S.C. § 1983 continues even after a governmental entity voluntarily changes its laws. No Supreme Court case holds that the Eleventh Amendment "pops up" to ban prospective relief once a state voluntarily changes its laws to comply with federal norms.[4] The question is one of Article III mootness; not the Eleventh Amendment's bar to suits against states.

As stated in Petitioner's Supplemental Brief, this Court has repeatedly invoked the voluntary cessation doctrine to overcome mootness. *See, e.g., City News & Novelty v. City of Waukesha*, 531 U.S. 278, 284 n.1

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[4] Respondent relies on *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), and *Green v. Mansour*, 474 U.S 64, 68-69 (1985), to support this odd proposition *See* Brief in Opposition at 25. *Edelman* ruled that the Eleventh Amendment protects states from retroactive awards of social security benefits. *Green* ruled that plaintiffs cannot attempt an "'end run' around . . . *Edelman*," 474 U S. at 73, by using federal declaratory relief to support state court orders of money benefits. (In *Green*, injunctive relief against state officials had been mooted by changes in federal – not state – law. Hence, the voluntary cessation doctrine did not apply.) Neither case supports Respondent's point Petitioner does not claim money damages of any sort.

(2001) ("voluntary cessation of a challenged practice rarely moots a federal case"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007). Respondent rejects these cases in favor of older precedents, like *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam). *See* Brief in Opposition at 24. Petitioner concedes that these older cases lend support to Respondent's claim.[5] However, this Court's more recent precedents uniformly reject mootness in the face of voluntary changes. Under this Court's recent

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[5] One commentator has observed that while "Supreme Court dicta seems to state that such legislative action does fall within the voluntary cessation exception," Michael Ashton, Note, *Recovering Attorneys' Fees With the Voluntary Cessation to Mootness Doctrine After* Buckhannon Board and Care Home, Inc v. West Virginia Department of Health and Human Resources, 2002 Wis L Rev. 965, 988, "the Supreme Court has yet to hold . . . that legislative repeal or amendment of a challenged law falls within the voluntary cessation exception." *Id.* Ashton further notes that lower federal courts tend to conclude under these circumstances that cases are rendered moot by legislative change. *Id.* at 988-89 *See also Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) ("any dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief"). Petitioner stands by the most recent Supreme Court precedent *See, e.g., Doctor John's, Inc. v. City of Sioux City, Iowa*, 389 F Supp.2d 1096, 1113 (N.D. Iowa 2005) ("The City's contention that the general rule is that repeal of an ordinance moots challenges to that ordinance is contrary to Supreme Court precedent"). If there remains doubt over the voluntary cessation doctrine's application to legislative change, Petitioner respectfully suggests that the question might be better carried with the case to full argument.

holdings, Mississippi's voluntary change does not moot Petitioner's constitutional challenge to the deadline that Respondent claims existed in 2008.[6]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[6] Even assuming that Petitioner's substantive challenge to the 5:00 PM deadline is rendered moot, Petitioner's procedural challenge to Respondent's constitutional authority to declare this deadline remains. *See* Petitioner's Supplemental Brief at 3-4